

1 SCHNEIDER WALLACE
2 COTTRELL BRAYTON KONECKY LLP
3 TODD M. SCHNEIDER (SBN 158253)
4 tschneider@schneiderwallace.com
5 JOSHUA G. KONECKY (SBN182897)
6 jkonecky@schneiderwallace.com
7 LISA M. BOWMAN (SBN 253843)
8 lbowman@schneiderwallace.com
9 180 Montgomery Street, Suite 2000
10 San Francisco, California 94104
11 Tel: (415) 421-7100
12 Fax: (415) 421-7105

13 FRANKLIN D. AZAR & ASSOCIATES, P.C.
14 FRANKLIN D. AZAR (*Pro Hac Vice*)
15 azarf@fdazar.com
16 MEGHAN MARTINEZ (*Pro Hac Vice*)
17 martinezm@fdazar.com
18 RICHARD BARKLEY (*Pro Hac Vice*)
19 barkleyr@fdazar.com
20 NATHAN J. AXVIG (*Pro Hac Vice*)
21 axvign@fdazar.com
22 JASON B. WESOKY (*Pro Hac Vice*)
23 wesokyj@fdazar.com
24 14426 East Evans Avenue
25 Aurora, Colorado 80014
26 Tel: (303) 757-3300
27 Fax: (303) 757-3206

28 Attorneys for Plaintiffs

THE LANIER LAW FIRM, P.C.
Christopher D. Banys SBN: 230038
Daniel M. Shafer SBN: 244839
cdb@lanierlawfirm.com
dms@lanierlawfirm.com
2200 Geng Road, Suite 200
Palo Alto, CA 94303
Tel: (650) 322-9100
Fax: (650) 322-9103

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

19 JEFFREY JOHNSON, JENNIFER
20 RIESE, SHAUN SIMMONS, and
21 JAMES PURVIS, individually, and on
behalf of others similarly situated,

22 Plaintiffs,
23 vs.
24 HEWLETT-PACKARD COMPANY
and DOES 1-25 Inclusive,

25 Defendants.

Case No. 3:09-cv-003596-CRB

CLASS ACTION

**MOTION TO COMPEL HP'S AUDIT
DOCUMENTS; FOR *IN CAMERA* INSPECTION
OF DOCUMENTS ALLEGED TO BE
PRIVILEGED; AND FOR A RESPONSE TO
INTERROGATORIES 18 AND 22**

26 Dept.: Courtroom 18, 19th Floor
27 Judge: Hon. Bernard Zimmerman
Hearing Date: Wednesday, January 5, 2011
Time: 10:00 am

NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 5, 2010, at 10:00 a.m., or as soon thereafter as the matter may be heard, before the Honorable Bernard Zimmerman, United States District Court, Northern District of California, Courtroom 18, 19th Floor, 450 Golden Gate Avenue, San Francisco, California, Plaintiffs will move to compel HP's audit documents (and documents concerning the audit); for an *in camera* inspection of documents alleged to be privileged; and for a response to Interrogatories 18 and 22.

MEMORANDUM OF POINTS AND AUTHORITIES

The key allegations in this case concern Hewlett-Packard Company's ("HP") failure to pay commissions and other incentive payments owed to its sales representatives. Plaintiffs (the "Employees"), allege that there were systemic and widespread problems with HP's computer and computer data entry systems designed to record sales and calculate commissions; a system centered around HP's Omega software, including the numerous data feeds that are part of the Omega ecosystem (collectively, "Omega").

8 Attempts to obtain information and documents from HP on issues relevant to Omega and
9 employee earnings has been an ongoing, frustrating battle. *See* Declaration of Meghan Martinez
10 ("Martinez Decl.") attached as Exhibit A. This motion has evolved from HP's refusal to provide
11 factual information regarding its defenses (in response to interrogatories) and HP's attempt to
12 improperly and untimely assert the attorney-client privilege and work product doctrine to conceal
13 key documents, including HP's own audits of Omega. These audits and audit documents are key to
14 establishing Plaintiffs' class-based allegations and damages, among other matters; in other words,
15 this discovery dispute is about the heart of the case.

FACTUAL BACKGROUND

This Court has recognized that a key issue in this case is whether Omega correctly calculated, and timely paid, the commissions owed to HP's sales representatives. Two highly relevant area of inquiry, therefore, concern: 1) efforts by HP to identify, quantify, and address problems with Omega and its calculation of commissions; and 2) efforts by HP to determine whether the Employees are owed any commissions.

A. Discovery Requests Related to HP's Audit of Omega

Almost nine months ago, on February 23, 2010, the Employees asked HP to produce:

All Documents related to any efforts to fix, review, maintain, patch, upgrade, replace, and/or update the Omega System between 2004 and the present, including any reviews of the Omega System conducted by any third parties.

(Plaintiffs' First Request for Production of Documents at 1 (Request No. 8).) *See also* Martinez Decl. (Ex. 1).

1 HP objected to Request No. 8 by advancing six generic objections, including: "[the request]
 2 seeks documents protected by the attorney-client privilege or attorney work product doctrine."
 3 (Defendant Hewlett-Packard Company's Response to Plaintiffs' First Set of Requests for Production
 4 Of Documents (the "Responses") at 7 (Response to Request No. 8). *See* Martinez Decl. (Ex. 2). HP
 5 then stated that "[s]ubject to and without waiving the foregoing objections, Defendant will produce
 6 non-privileged, responsive documents to the extent they exist and can be located." (*Id.*) HP failed to
 7 either produce any documents that were responsive to Request No. 8 or a privilege log when it
 8 submitted its Responses. *See* Martinez Decl. Thus, the Employees were unable to determine
 9 whether HP had no responsive documents, or whether it believed them to be privileged. (*Id.*)

10 On May 5, 2010, HP produced 2,400 pages of documents – none related to any audits
 11 (internal or external) of Omega. (*Id.*) HP also failed to produce a privilege log. (*Id.*) Finally, on
 12 August 5, 2010, three months after it responded to the Employees' Requests, HP produced a
 13 privilege log identifying a mere 12 documents. (*Id.*) Nine of the document descriptions referred to
 14 a "FY09 SOX [Sarbanes-Oxley] Audit" that purportedly had been performed at the direction of
 15 HP's Deputy General Counsel. (*See, e.g.*, Privilege Log at 1 (Entry No. 2). *See* Martinez Decl.
 16 (Ex. 3). No documents listed on the privilege log referred to any other "efforts to fix, review,
 17 maintain, patch, upgrade, replace, and/or update the Omega System between 2004 and the present .
 18 . . ." (Martinez Decl.) In fact, the only "audit" identified in the first privilege log appears to be a
 19 routine audit done by Ernst and Young to determine compliance with SEC rules and regulations.

20 More recently, however, HP revealed the audit was something much more relevant to
 21 Omega. The factual developments that lead to this revelation are as follows: During Robert Slaby's
 22 deposition, Employees' counsel asked Slaby about audits of Omega performed by third-party
 23 consultants. (*Id.*) HP's counsel instructed Slaby not to answer if "any such audits were done under
 24 the direction of legal counsel." (Deposition of Robert Frederic Slaby ("Slaby Dep."), 243:9-18
 25 Martinez Decl. (Ex. 4).) Slaby refused to answer the question about his knowledge of third-party
 26 audits. *See also* Martinez Decl. However, in a separate line of questioning, Slaby disclosed the fact
 27 that HP employees with Sales Compensation Operations checked the results from Omega, and that

1 "processes [HP has] in place also include **an audit** of the processes to make sure they're being
 2 followed." (See Slaby Dep., 68:6-69:9 (emphasis added) Martinez Decl. (Ex. 4).) So, on
 3 September 28, 2010, the Employees served a document request seeking "[a]ll Documents generated
 4 since August 1, 2005, relating to 'audits' or 'testing' of OMEGA output . . ." ¹

5 On November 2, 2010 – almost nine months after the Employees sought "[d]ocuments
 6 related to any efforts to fix, review, maintain, patch, upgrade, replace, and/or update the Omega
 7 System" – HP confirmed an internal audit of Omega took place in 2009. *See* Martinez Decl. HP
 8 finally did so by including several documents about this internal audit (the "Audit") on HP's Second
 9 Privilege Log (served November 2nd). (Martinez Decl. (Ex. 5).) Still, HP refused to produce
 10 responsive audit documents. (*Id.*) HP's position lead Employees' counsel to file a letter with this
 11 Court.

12 When asked about the Audit during a subsequent telephonic hearing, HP's counsel
 13 confirmed that a notice relating to the Audit "went out in April 2009." (*Id.*) And, just as important,
 14 the Audit was commenced for internal - business - reasons. (*Id.*) Notably, no legal counsel was
 15 involved in the decision to commence the Audit. (*Id.*) Months later – after a reporter contacted HP
 16 about Omega's problems – outside legal counsel brought in on the Audit. (*Id.*) HP claims,
 17 nonetheless, that the Audit is protected because it was eventually conducted "under the direction" of
 18 counsel. As explained below, HP's position is untenable.

19 **B. Employees' Efforts to Obtain Discovery Regarding HP's Claim Employees Are
 20 Not Owed Anything**

21 During the Parties' Rule 26 conference, HP's counsel affirmatively represented that HP had
 22 looked into whether the Employees were owed anything. (*Id.*) HP's counsel claimed the
 23 Employees were owed nothing. (*Id.*) After the hearing on HP's first motion to dismiss, HP's
 24 counsel again represented that HP had determined the Employees were not owed anything. (*Id.*)

25 On February 23, 2010, Employees served at least three discovery requests on this issue (*Id.*):
 26 • "Explain and describe all efforts . . . since the notice of this litigation to determine

27 ¹ It is possible there were two separate audits in 2009, one with Ernst and Young, and one internal to HP to assess
 28 problems with Omega. Plaintiffs are unable to determine from HP's privilege logs if there are two separate audits.

1 whether or not any of the named Plaintiffs . . . were owed commissions or bonuses."
 2 Interrog. 7.

3 • "Identify and describe any efforts by HP to calculate wages, commissions, and/or
 4 bonuses owed to past or present employees as part of a window of correction, or other
 voluntary analysis or adjustment of wages (related to the Omega system) . . ." Interrog. 9.

5 • Produce "[a]ll Documents related to HP's efforts since it received notice of this
 6 lawsuit to identify any Commissions or Bonuses owed to any current or former HP
 employee, including Documents created as a result of any such search . . ." RFP 14.

7 HP never provided the requested information. (*Id.*) After meet and confer efforts, the
 8 Employees decided to lodge even more specific requests. The Employees asked (*Id.*):

9 If HP contends that any of the named Plaintiffs were fully compensated for their
 10 sales at HP, then describe in detail how You can or plan to prove that contention,
 11 including within Your answer: how You calculated the sales for which each
 12 Plaintiff was paid; the date(s) and amount(s) of all sales by each Plaintiff since
 13 August 1, 2005; the amount(s) credited by HP to each Plaintiff for each sale; the
 Bates number of each Document that You either produced or are relying upon to
 make this contention; and the Bates numbers of all Documents that comprise the
 "data we received for any Colorado employees" as referenced in page 48 of Becky
 Kidd's deposition transcript." 'Rog 18.

14 Walk through and describe (with references to any Documents produced, if
 15 applicable), in detail, how HP intends to establish (in motions, depositions and/or
 16 at trial) that the named Plaintiffs were in fact paid all amounts claimed in the
 17 Third Amended Complaint (i.e., that HP paid all wages, commissions, etc.).
 18 Include in Your detailed response all calculations made to establish that there was
 payment in full. 'Rog 22

19 HP has never answered these interrogatories.² *See* Martinez Decl. Instead, HP claims the
 Employees were attempting to discover HP's legal strategy and work product (*Id.*):

20 Defendant objects to this interrogatory on the ground that it implicitly relies on
 21 the erroneous legal conclusion that Defendant has the burden to "prove" that
 22 Plaintiffs were "fully compensated for their sales at HP." Defendant has no reason
 23 to believe that Plaintiffs were not paid all of their earnings. Plaintiffs have the
 24 burden of proof on all of their claims involving their contention that they were not
 25 "fully compensated." Defendant's "plan" is to defend against the evidence and
 26 arguments presented by Plaintiffs. Defendant objects to this interrogatory on the
 27 ground that the phrasing of it ("how you plan to prove that contention . . .") calls
 28 for attorney work product by expressly seeking Defendant's counsel's trial
 strategy rather than simply asking whether Plaintiffs were paid properly and why

² HP also never responded to Interrogatory 23 which asks HP to identify those involved and with knowledge of the information provided in Interrogatory 22. This motion also seeks a response to Interrogatory 23.

1 Defendant believes that to be true or not. Defendant objects to this interrogatory
 2 on the ground that it asks how Defendant "plans" to prove any contention that
 3 Plaintiffs were "fully compensated" and then attempts to impose Plaintiffs' theory
 4 of the case on Defendant by seeking "the date(s) and amount(s) of all sales by
 5 each Plaintiff since August 1, 2005; the amount(s) credited by HP to each Plaintiff
 6 for each sale" Plaintiffs are not entitled to dictate how Defendant will choose
 7 to formulate its defense in this case. Defendant also objects on the ground that
 8 Plaintiffs' service of joint interrogatories from all Plaintiffs and inclusion of
 9 multiple subparts is an attempt to circumvent the 25-interrogatory limit under Fed.
 10 R. Civ. P. 33(a)(1). The interrogatory asks for individualized information about
 11 each of the five named Plaintiffs in what purports to be a single interrogatory.
 12 Further, it contains multiple discrete Sub-parts: (1) "describe in detail how You
 13 can or plan to prove that contention"; (2) "how You calculated the sales for which
 14 each Plaintiff was paid"; (3) "the date(s) and amount(s) of all sales by each
 15 Plaintiff since August 1, 2005"; (4) "the amount(s) credited by HP to each Plaintiff
 16 for each sale"; (5) "the Bates number of each Document that You either produced
 17 or are relying upon to make this contention"; (6) and "the Bates numbers of all
 18 Documents that comprise the 'data we received for any Colorado employees' as
 19 referenced in page 48 of Becky Kidd's deposition transcript." Subject to and
 20 without waiving the foregoing objections, Defendant responds as follows:
 21 Defendant objects to this interrogatory on the ground that, in addition to seeking
 22 attorney work product, it is a premature contention interrogatory. *See, e.g., In re*
23 Convergent Technologies Securities Litigation, 108 F.R.D. 328 (D.C. Cal. Oct.
24 28, 1985); In re eBay Seller Antitrust Litigation, 2008 WL 5212170 at *2 (N.D.
25 Cal. Dec. 11, 2008).

26 Response to 'Rog 18.

27
 28 Defendant objects to this interrogatory on the ground that it implicitly relies on
 1 the erroneous legal conclusion that Defendant has the burden to prove that
 2 Plaintiffs "were in fact paid all amounts claimed" in the lawsuit. Defendant has no
 3 reason to believe that Plaintiffs were not paid all of their earnings. Plaintiffs have
 4 the burden of proof on all of their claims involving their contention that they were
 5 not "paid all amounts" that they claim they are owed. Defendant "intends to
 6 establish" that it is not liable to Plaintiffs by defending against the evidence and
 7 arguments presented by Plaintiffs. Defendant further objects on the ground that
 8 the framing of this interrogatory as a request for Defendant to describe how, "in
 9 motions, depositions and/or trial," it intends to "establish ... that the named
 10 Plaintiffs were in fact paid all amounts" claimed in Plaintiffs' lawsuit calls for
 11 attorney work product by expressly seeking Defendant's counsel's litigation and
 12 trial strategy. Defendant also objects on the grounds that Plaintiffs' service of joint
 13 interrogatories from all Plaintiffs is an attempt to circumvent the 25-interrogatory
 14 limit under Fed. R. Civ. P. 33(a)(1). The interrogatory asks for individualized
 15 information about each of the five named Plaintiffs in what purports to be a single
 16 interrogatory. To the extent that this Interrogatory is not objectionable for the
 17 reasons above, it is duplicative of Interrogatory No. 18.

1 Response to 'Rog 22.

2 Notwithstanding, HP has repeatedly represented the Employees are not owed anything
 3 because HP has looked and found nothing. These two interrogatories, and the three document
 4 requests submitted ten months ago, all seek the same information: *what did HP look at and how did*
 5 *HP determine Plaintiffs are not owed anything?* The Employees are simply asking HP to describe
 6 how it can calculate they are not owed any commissions. This will allow the Employees to
 7 determine what information HP has not supplied it in discovery. Furthermore, to credibly and
 8 accurately assert the Employees are owed nothing, HP had to examine specific data: 1) sales the
 9 Employees actually made; 2) all sales for which the Employees received credit; 3) all manual
 10 claims the Employees made; and 4) all sales made to the Employees' customers or in their
 11 territories. And the information and data HP examined in order to represent that the Employees
 12 were owed nothing is entirely *factual*.

13 **ARGUMENT**

14 **I. THE AUDIT, AND DOCUMENTS CONCERNING THE AUDIT, ARE NOT
 PROTECTED FROM DISCLOSURE.**

15 HP's Second Privilege Log (served just three weeks ago) is thirty-three pages long and lists
 16 346 new documents. *See* Martinez Decl. Every single document listed claims to be protected from
 17 disclosure by both the attorney-client privilege and the work product doctrine. (*Id.*) Neither the
 18 privilege nor the work product doctrine applies. (*Id.*)

19 The privilege and work product do not apply because the information the Employees seek is
 20 factual. HP's espoused view of the attorney-client privilege and work product doctrine vastly
 21 exceeds the legitimate scope of any privilege or immunity. As the Ninth Circuit recently explained:
 22 "[T]he attorney-client privilege does not 'create a broad "zone of silence" over' the subject matter of the
 23 communication. 'The privilege only protects disclosure of [the] communications [themselves]; it does
 24 not protect disclosure of the underlying facts,' so long as the underlying facts can be proven without
 25 resort to the privileged materials." *Murdoch v. Castro*, 609 F.3d 983, 995 (9th Cir. 2010) (quoting
 26 *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981)). Similarly, the work product doctrine "does not
 27 protect facts concerning the creation of work product or facts contained within work product."

1 *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995).

2 The information the Employees seek, and HP is trying to conceal, is purely factual. *See*
 3 Martinez Decl. HP performed an internal audit to determine what was wrong with Omega and how to
 4 fix it. What actually is wrong with Omega and how it can be fixed are matters of pure fact. They do not
 5 represent the thoughts, strategy, or communications of counsel. (And any such thoughts or
 6 communications could – as this Court highlighted in the November 19, 2010 hearing – be redacted
 7 leaving the underlying facts, calculations and synopses.) In sum, the reason for the Audit – if devised
 8 by an attorney (which it was not) – may be privileged or considered work product. The results of the
 9 audit are not. Even a cursory review of the Second Privilege Log confirms that neither the privilege nor
 10 work product doctrine apply because no attorney was involved in creating or receiving the vast majority
 11 of the documents listed. *See* Martinez Decl. Only 78 of the 346 documents listed in the privilege log
 12 identify an attorney as an author or recipient. (*Id.*) Thus, the privilege does not apply to 268 of the
 13 documents. *See Oakely, Inc. v. Bugaboos Eyewear Corp.*, 2010 WL 4117223 (S.D. Cal. Oct. 15, 2010).
 14 In many instances when an attorney is a recipient, the attorney is one of several persons carbon copied.
 15 HP cannot create a privilege simply by including an attorney on an email. *See IP Co., LLC v. Cellnet*
 16 *Technology, Inc.*, 2008 WL 3876481, 2008 U.S. Dist. LEXIS 79776 (N.D. Cal. Aug. 18, 2008). With
 17 respect to the Audit itself, HP asserts that Robert J. Smith in Morgan, Lewis & Bockius LLP's
 18 Washington D.C. office, "became involved in the audit" in July 2009, the same time that work
 19 began on the Audit. (HP's Response to the First Letter at 1 (November 16, 2010).) Yet not a single
 20 document, e-mail, letter, or memorandum by, to, or from Smith is contained on the Second
 21 Privilege Log during May, June, July, or August 2009. Thus, according to the Second Privilege
 22 Log, Smith was the invisible lawyer, involved in an audit but leaving no paper or electronic trail.
 23 The Audit documents are simply not privileged because no attorney was involved and these
 24 documents must be produced. Mr. Smith was invisible, in part, because most of the documents HP
 25 is trying to keep secret were created before this litigation began, thus precluding the work product
 26 doctrine from applying. *See Lewis v. Wells Fargo & Co.*, 226 F.R.D. 433, 439-40 (N.D. Cal. 2010).
 27 Of the documents listed in HP's Second Privilege Log, 185 were created before this case was filed

1 on August 6, 2009. *See* Martinez Decl. With respect to the Audit documents, HP asserts that "work
 2 on the [A]udit began in late July 2009," (*id.* at 2), but HP's documents, HP's counsel's own
 3 admissions in the November 19, 2010 hearing, and the privilege log itself prove the Audit started
 4 much earlier.

5 Notably, HP has produced a document, a presentation given by HP personnel showing that
 6 HP completed the Audit before July 2009, when Robert J. Smith supposedly "became involved in
 7 the audit." *See* Martinez Decl. The presentation discusses an audit of Omega and the inaccuracy of
 8 Omega. (*Id.*) Though the presentation is not dated, context shows it was likely done on June 19,
 9 2009 because Father's Day is mentioned, which was June 21, 2009. (*Id.*) The presentation further
 10 states the Audit was completed, and Omega was re-opened, the week before, which was the week of
 11 June 8, 2009. (*Id.*) Assuming HP's outside counsel did in fact become involved in July 2009, that
 12 was well after the Audit was completed.

13 HP's counsel has all but admitted the Audit is not privileged or work product. During the
 14 November 19, 2010 telephonic hearing with the Court, HP's counsel stated that a notice went out in
 15 April 2009 about the Audit. (*Id.*) HP's counsel also admitted the Audit was commenced for
 16 internal, business reasons and that those involved in initiating the Audit had not consulted with HP's
 17 legal department before sending out the notice. (*Id.*) In fact, the only reason Mr. Smith became
 18 involved was because on June 4, 2009 – likely after the Audit was complete, at least according to
 19 HP's own documents – a reporter from the Wall Street Journal called HP. (*Id.*)

20 The (second) privilege log produced by HP also supports that the Audit was initiated if not
 21 complete before July 2009. (*Id.*) The privilege log alleges that documents created in March and
 22 April 2009 are "email[s] involving analysis prepared as part of a privileged internal audit."
 23 (Privilege Log dated 11/02/2010, at pp. 8-9 (Nos. 93, 95, 96, 99.) This shows that "work on the
 24 audit began" well before "late July 2009 . . ." (HP's Response to the First Letter at 2.)

25 The Audit documents are not privileged or protected by the work product doctrine because
 26 they are factual, no attorney was involved, and they were created before this litigation began.
 27 Moreover, HP has waived any privilege or work product doctrine claim because it failed to even

1 produce a privilege log until long after the documents were collected or produced. On November 2,
 2 2010 – more than eight months after HP first received discovery requests, HP produced its first
 3 substantive privilege log listing 346 allegedly privileged and work product documents. The blanket
 4 assertion of both privilege and work product eight months after discovery fails. "[B]oilerplate
 5 objections or blanket refusals inserted into a response to a [Fed. R. Civ. P.] 34 request for
 6 production of documents are insufficient to assert a privilege." *Burlington Northern & Santa Fe*
 7 *Railway Co. v. United States District Court for the District of Montana*, 408 F.3d 1142, 1149 (9th
 8 Cir. 2005). The 30-day time limit to respond to requests for production of documents set forth in
 9 Fed. R. Civ. P. 34 is a good guideline to establish when a privilege log must be produced. When a
 10 privilege log "was filed five months" after discovery responses, the privilege was waived. *Id.* In
 11 this case, the delay was more than seven months after Rule 34's 30-day default guideline. Thus, HP
 12 waived any privileges or immunities.

13 **II. HP's CLAIM ITS CALCULATIONS AND THE FACTUAL INFORMATION IT
 14 REVIEWED TO DETERMINE THE EMPLOYEES ARE ALLEGEDLY OWED
 15 NOTHING MUST BE PRODUCED**

16 HP has repeatedly represented that it determined the Employees are not owed any
 17 commissions or other wages. *See* Martinez Decl. Plaintiffs' first set of discovery asked HP to
 18 describe its efforts to make this determination, including what HP did "to determine whether or not
 19 any of the named Plaintiffs or any other current or former HP employees were owed Commissions
 20 or Bonuses." Through the meet and confer process, the Employees refined this request, ultimately
 21 asking HP, in Interrogatory 18, to describe how it calculated sales it paid the Employees for; the
 22 dates and amounts of all sales by the Employees; and amounts HP credited to each Employee for
 23 each sale. Interrogatory 22 asked HP to describe how HP will establish that the Employees were
 24 paid all amounts claimed and to provide all calculations that establish such payment. (Martinez
 25 Decl. (Ex. 6).)

26 HP simply refuses to respond to these Interrogatories. *See* Martinez Decl. (Ex. 7). Though
 27 the information sought is critical and factual, and should be produced. The Employees seek
 28 documents and information HP allegedly used to determine the Employees are not owed anything.

1 HP's refusal to provide the information on grounds of privilege and work product is an abuse of the
 2 privilege and work product doctrines as neither can be used as both a sword and a shield. *Chevron*
 3 *Corp. v. Pennzoil Co.* 974 F.2d 1156, 1162 (9th Cir. 1992). HP will surely defend class
 4 certification or move to dismiss the Employees' claims on the ground that they are not owed
 5 anything and thus either have no claim or cannot represent the class. In order to overcome HP's
 6 defenses and establish their claims, the Employees need the information HP used to come to its
 7 conclusion, thus the information is critical.

8 The information sought is not the thoughts or communications of counsel. The data HP
 9 used to make its determination, and the calculations performed using such data, are facts in this
 10 case, not protected counsel communications or advice. *See Murdoch*, 609 F.3d at 995; *Resolution*
 11 *Trust Corp.*, 73 F.3d at 266. Accordingly, the information must be produced.

12 WHEREFORE, Plaintiffs request the Court enter:

- 13 1. An expedited ruling that documents constituting or concerning HP's audits, including any
 and all audits in the first half of 2009, are discoverable unless the document (a) expressly
 states that it is from HP's outside or inside counsel ("counsel"); (b) refers to advice from
 counsel, and explicitly states that the advice was given by counsel; (c) is sent to counsel
 directly and individually, and not as one person listed in a string of carbon copies; and/or (d)
 expressly requests advice from counsel and specifically identifies the questions or issues for
 which counsel advice is given.
- 14 2. An expedited ruling that HP has waived any claim of privilege or immunity for documents
 constituting or concerning the audit or audits that HP did not list on its July 30, 2010
 privilege log; or alternatively, a ruling that HP has waived any claim of privilege or
 immunity for documents constituting or concerning any audits that were not listed on its
 November 2, 2010 privilege log (descriptions of which were updated on November 15,
 2010).
- 15 3. An expedited ruling that Plaintiffs have shown substantial need for documents constituting
 or concerning HP's audit(s); and
- 16 4. An order directing HP to respond to Interrogatories 18 and 22 within five (5) days of this
 court's order.
- 17 5. An order finding that HP's delay in producing a privilege log identifying documents for
 which it was claiming privilege or immunity constitutes a waiver of any such claim of
 privilege.

26 In the alternative to 1, 2, 3, and 5 above, the Employees request that the Court conduct an *in*
 27 *camera* review of documents for which HP has claimed protection from disclosure.

1 Respectfully submitted,

2 Date: November 24, 2010

3 FRANKLIN D. AZAR &
4 ASSOCIATES, P.C.

5 GRADY SCHNEIDER, L.L.P.

6 SCHNEIDER WALLACE
7 COTTRELL BRAYTON
8 KONECKY LLP

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11
Plaintiffs' Motion to Compel
Case No. 3:09-cv-003596-CRB, *Johnson, et al., v. Hewlett Packard Co.*